

REPORT DOCUMENTATION PAGE					<i>Form Approved</i> OMB No. 0704-0188													
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1. REPORT DATE (DD-MM-YYYY) 11/06/2015		2. REPORT TYPE Master's Thesis			3. DATES COVERED (From - To) 21-07-2014 to 11-06-2015													
4. TITLE AND SUBTITLE Provide for the Common Defence: Rebalancing Constitutional War Powers in the 21st Century				5a. CONTRACT NUMBER														
				5b. GRANT NUMBER														
				5c. PROGRAM ELEMENT NUMBER														
6. AUTHOR(S) Lt Col William H. Burks, USAF				5d. PROJECT NUMBER														
				5e. TASK NUMBER														
				5f. WORK UNIT NUMBER														
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Joint Forces Staff College Joint Advanced Warfighting School 7800 Hampton Blvd Norfolk, VA 23511-1702					8. PERFORMING ORGANIZATION REPORT NUMBER													
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)					10. SPONSOR/MONITOR'S ACRONYM(S)													
					11. SPONSOR/MONITOR'S REPORT NUMBER(S)													
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution is unlimited																		
13. SUPPLEMENTARY NOTES																		
14. ABSTRACT The Constitution's framers designed a new form of government that sought to prevent monarchical tendencies and distribute power while ensuring vigorous execution of the enumerated powers. The framers paid particular attention to the distribution of war powers. To assuage fears associated with the English monarch, the framers placed the preponderance of enumerated war powers in the legislative branch, including the power to declare war, and limited the executive branch to one - commander-in-chief. The changing nature of the world following the nuclear conclusion to World War II enabled the executive to dominate the Constitution's war powers distribution. Congress must act collectively to correct the imbalance.																		
15. SUBJECT TERMS US Constitution, War Powers Resolution																		
16. SECURITY CLASSIFICATION OF: <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%; padding: 2px;">a. REPORT</td> <td style="width: 33%; padding: 2px;">b. ABSTRACT</td> <td style="width: 33%; padding: 2px;">c. THIS PAGE</td> </tr> <tr> <td style="text-align: center; padding: 2px;">(U)</td> <td style="text-align: center; padding: 2px;">(U)</td> <td style="text-align: center; padding: 2px;">(U)</td> </tr> </table>			a. REPORT	b. ABSTRACT	c. THIS PAGE	(U)	(U)	(U)	17. LIMITATION OF ABSTRACT (U)		<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%; padding: 2px;">18. NUMBER OF PAGES</td> <td style="width: 66%; padding: 2px;">19a. NAME OF RESPONSIBLE PERSON</td> </tr> <tr> <td style="text-align: center; padding: 2px;">62</td> <td style="padding: 2px;"></td> </tr> <tr> <td colspan="2" style="padding: 2px;"> 19b. TELEPHONE NUMBER (Include area code) 757-443-6301 </td> </tr> </table>		18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON	62		19b. TELEPHONE NUMBER (Include area code) 757-443-6301	
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NATIONAL DEFENSE UNIVERSITY
JOINT FORCES STAFF COLLEGE
JOINT ADVANCED WARFIGHTING SCHOOL



PROVIDE FOR THE COMMON DEFENCE:
Rebalancing Constitutional War Powers for the 21st Century

by

William Halsey Burks

Lt Col, US Air Force

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Rebalancing Constitutional War Powers for the 21st Century

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William Halsey Burks

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A paper submitted to the Faculty of the Joint Advanced Warfighting School in partial satisfaction of the requirements of a Master of Science Degree in Joint Campaign Planning and Strategy. The contents of this paper reflect my own personal views and are not necessarily endorsed by the Joint Forces Staff College or the Department of Defense.

This paper is entirely my own work except as documented in footnotes.

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Abstract

The framers of the Constitution debated and designed a new form of government that sought to prevent monarchical tendencies and distribute power while ensuring vigorous execution of the enumerated powers within the guiding document. Less than a decade removed from the Revolutionary War, but still surrounded by European powers, the designers of the Constitution paid particular attention to the distribution of war powers. To assuage fears associated with the English monarch's use of military force in the Colonies, the framers gave the legislative branch the preponderance of enumerated war powers, including the power to declare war, and limited the executive branch to one – commander-in-chief. Early Congressional actions, supported by a unanimous Supreme Court decision, demonstrated Congress had authority in limited, or undeclared, wars. However, the changing nature of the world following the nuclear conclusion to World War II, and America's rise to political dominance among Western nations, increasingly set the conditions for the executive to exert greater control over the balance of war powers and decisions regarding the use of America's military forces. Congress attempted to correct the imbalance through the passage of the War Powers Resolution near the conclusion of the Vietnam War. However, a poorly written law failed to achieve the desired effect. Subsequent presidents have continued to dominate the decision to use military force, often without specific Congressional authorization. If Congress is to rebalance the intended Constitutional war powers, it must act collectively to correct the War Powers Resolution's shortcomings and hold presidents accountable for failing to comply with the revised resolution's requirements. Without corrective legislative action, presidents will continue to dominate the decision to commit the nation to war.

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Dedication

Special gratitude goes to my wife and son for their extended patience and unfailing support this year. They were, and are, a constant source of encouragement, motivation, and strength during demanding times.

Acknowledgements

Dr. Keith Dickson provided immeasurable support and guidance on scoping, shaping, and reshaping the argument presented. His encyclopedic knowledge of history and sources facilitated research and ensured the foundational points of the thesis maintained the proper political and historical context of the periods discussed.

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Chapter 1 - Introduction

Unlimited power is in itself a bad and dangerous thing. Human beings are not competent to exercise it with discretion. God alone can be omnipotent, because his wisdom and his justice are always equal to his power. There is no power on earth so worthy of honor in itself or clothed with rights so sacred that I would admit its uncontrolled and all-predominant authority.
— Alexis de Tocqueville, *Democracy in America*¹

This thesis explores the executive branch's rise to near preeminence in the exercise of America's Constitutional war powers following World War II. Nuclear age security challenges between nations created dangerous and unwanted implications with formal declarations of war. Starting with the Korean War, the executive branch steadily gained broader prerogatives as it deliberately expanded the authority claimed pursuant to the Constitutional role of commander-in-chief. Since the Congressional authorization of military force in Vietnam, multiple presidents dictated to Congress when the nation would employ the national instrument of military force.

Frustrated with the course of the Vietnam War, Congress attempted to restore the balance of war power via the War Powers Resolution of 1973, but a poorly written law allowed the executive branch to continue to dominate the decision for war. Since its passage, Congress has rarely collectively challenged the executive for overstepping its bounds, especially in regards to limited, or undeclared, war. If Congress is to alter the expansion of executive authority claimed via the commander-in-chief role, it must take a more unified approach in constraining the executive branch.

¹ Alexis de Tocqueville, *Democracy in America*, ed. Phillips Bradley (New York: Oxford University Press, 2004), 270.

American Foreign Policy Frameworks

Walter Russell Mead suggests American foreign policy falls into four basic historical perspectives. Mead labels them Hamiltonian, Jeffersonian, Jacksonian, and Wilsonian. *Hamiltonians* view foreign policy through economics. The government's primary role is to advance economic prosperity around the globe. Disruption of trade is the dominant foreign policy concern.² *Wilsonians* believe America has "a moral and practical duty to spread its values through the world."³ American interests progress when other states embrace and act according to American values. *Jacksonians* couch foreign policy in terms that appeal to American nationalistic passions, which Mead describes as "honor, independence, courage, and military pride."⁴ *Jeffersonians* note democracy's continuously fragile nature. They harbor greater concern about protecting its success at home rather than advocating its successful export globally. Government's primary role in a dangerous world is to safeguard American democracy and values domestically through the most cost effective and least dangerous avenue possible.⁵

Up to the entry of the United States in World War II, Congress was able to exert a level of Jeffersonian influence over the executive branch. Since 1941, the Jacksonian and Wilsonian approaches dominated US foreign policy in regards to the military element of national power. The executive branch repeatedly defined American interests in Wilsonian terms and used the Jacksonian approach to justify their pursuit. Today, Congress must embrace a more Jeffersonian mindset if it desires to reaffirm its Constitutional role in

² Walter Russell Mead, *Special Providence: American Foreign Policy and How it Changed the World* (New York: Rutledge, 2002), 87, 102-103.

³ Ibid., 88.

⁴ Ibid.

⁵ Ibid.

foreign policy, especially in limiting the sole prerogative of the president as commander-in-chief to commit the nation to military action without authorization from Congress.

Methodology

This thesis builds the argument in five segments. First, key debates and notes from the Constitutional Convention of 1787, excerpts from *The Federalist Papers*, and applications from 1793-1800 establish the concept of Constitutional checks and balances related to war powers. Second, a short historical survey shows how the employment of force in American foreign policy evolved outside the strict limits of a declaration of war and propelled the executive branch into dominance. Third, the thesis examines the evolution of the 1973 War Powers Resolution and details the law's key tenets. Fourth, the thesis shows how presidents undermined the intent of the resolution, ceremonially acknowledging its reporting requirements while refusing to comply with its intended constraints. Finally, the thesis proposes Congressional actions to gain greater balance in the decision to use military force in the pursuit of national interests.

Chapter 2 - Framers' Intent

The framers of the Constitution ultimately designed a form of government that shared a balance of power across three equal branches. Within that design were purposely-implanted tensions to diffuse the central government's power. The thesis's focus of interest is the issue of war and military action. Article I, Section 8 of the Constitution gives Congress the authority to declare war. The president has a unique role enumerated in Article II, Section 2 as the commander-in-chief of the armed forces. Three periods of debate shaped this separation between the legislative and executive branches: the convention debates, the ratification debates, and the practical implementation of the Constitution by the first presidents.

1787 Constitutional Convention Debates

Debates regarding the distribution of powers to start and end wars ran throughout the convention. Early in the process, Charles Pinckney argued for a "vigorous executive" but feared that any extension of powers related to war and peace would lead to the creation of a monarchy. John Rutledge favored a singular executive, but was also hesitant to grant the president powers of war and peace.¹ In mid-summer, the convention sought to clarify the legislative war powers of the draft Constitution – should Congress have the power to make war? Charles Pinckney opposed placing the power to make war with the legislative branch arguing that its proceedings would be too slow. Pierce Butler made an idealistic case for the executive to control the power, proposing that the president would not make war without the support of the nation. George Mason suggested the executive could not be safely trusted with the power to declare war, nor was the Senate properly

¹ James Madison, "Madison Debates, June 1," The Avalon Project, Yale Law School, http://avalon.law.yale.edu/18th_century/debates_601.asp (accessed February 7, 2015).

constructed to exercise such power unilaterally. He urged that the process for declaring war be of a more complicated nature. The convention eventually agreed to give Congress the power to *declare* war with the qualification that the executive had the power and authority to repel attacks.² In late summer, the convention had the last debate over the distributed war powers, specifically, ending wars. The president and two-thirds of the Senate would be required to conclude peace treaties. The arrangement placed a legislative control on potentially unethical executives who might exploit war for power.³

Thus, the Constitutional Convention intentionally complicated the process of declaring and ending war. In unambiguous situations, where a decision for war was required, Congress had clear authority to debate as necessary and vote for a formal declaration. The president, even as commander-in-chief, could only ask Congress's permission for a state of war to exist. However, the Constitution left a great deal to interpretation in cases where the president used his commander-in-chief authority in ambiguous situations that required a rapid response – such as an invasion or direct threat to the nation's survival. There was no delineation of authority in this case. There was also the issue of peace – both the president and Congress needed to play a role for war to end. Again, the Constitution had no instructions on how to execute this nuanced process.

The Federalist Papers

After the convention, Alexander Hamilton, James Madison, and John Jay wrote to defend the Constitution's construct. In *Federalist 3* and *4*, Jay argued a single national government was more apt to keep the nation in a state of peace than multiple state

² James Madison, "Madison Debates, August 17," The Avalon Project, Yale Law School, http://avalon.law.yale.edu/18th_century/debates_817.asp (accessed January 24, 2015).

³ James Madison, "Madison Debates, September 7," The Avalon Project, Yale Law School, http://avalon.law.yale.edu/18th_century/debates_907.asp (accessed February 8, 2015).

governments surrounded by hostile entities. A national government restrained human nature's natural tendency towards war.⁴ War was to be the exception in America.

In *Federalist 23*, Hamilton detailed the benefits of the new federal government compared to the Articles of Confederation. The first purpose of the proposed government was common defense:

The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.⁵

Hamilton's list of five essential enumerated powers showed four belonging to Congress. If the federal government, as an entity, was to be trusted with the common defense, it needed the appropriate powers to act.⁶ These powers, in Hamilton's opinion, rested overwhelmingly with Congress.

In *Federalist 24*, Hamilton explained the necessity for the legislature to have the primary responsibility for national defense, pointing to the dangers of European powers threatening the independence of the United States.⁷ In *Federalist 51*, Madison asserted that the legislative branch would naturally gain greater influence, but the enumerated powers of the other branches helped keep it in check.⁸ Ultimately, the legislature remained the dominant governmental authority.

In *Federalist 69*, Hamilton made it clear that the president as commander-in-chief had "nothing more than the supreme command and direction of the military and naval

⁴ Clinton Rossiter, ed., *The Federalist Papers* (New York: New American Library, 2003), 40.

⁵ *Ibid.*, 149.

⁶ *Ibid.*

⁷ *Ibid.*, 156-157.

⁸ *Ibid.*, 318-319.

forces, as first general.”⁹ The powers to declare war and raise and regulate military forces belonged to Congress.¹⁰ Nevertheless, Hamilton supported a capable and energetic unitary executive in relation to war. In *Federalist 70*, he noted security benefits gained from a strong executive during the conduct of war would vanish under a plural executive. In *Federalist 74*, he reemphasized the nuance of the commander-in-chief role: “the direction of war most peculiarly demands . . . the exercise of power by a single hand.”¹¹

Combined, the totality of Jay, Madison, and Hamilton’s *Federalist* writings in regards to war powers demonstrates a clear separation of powers, with the responsibility for national security and the decision for war resting with the Congress. The execution of the war once declared rested with the president, who would provide command authority and energetic, unified direction.

Pacificus-Helvidius Debates

An early executive interpretation of a standing treaty by George Washington gave rise to another debate between Hamilton and Madison. The Treaty of Alliance and Treaty of Amity and Commerce with France, signed and ratified in 1778, created a presidential dilemma if they were truly part of the supreme law of the land as codified in Article VI of the Constitution. The treaties established US recognition of French possessions in North America and potentially allowed French privateers to use US ports should war break out with Great Britain. When France and Great Britain went to war in 1793, US popular

⁹ Ibid., 416.

¹⁰ Ibid.

¹¹ Ibid., 421-423, 446.

sentiment still vastly resented the English and favored the French. Washington, however, wished to remain neutral and not risk British reprisal.¹²

In *Pacificus I*, Hamilton argued the executive branch was the natural arbiter of declaring neutrality. The legislative branch was not primary in foreign affairs, nor was it charged to make or interpret treaties. The judicial branch's role resided within litigated cases regarding treaties. Hamilton now argued the construct of the Constitution gave the president broad general powers since it declared "[t]he executive Power shall be vested in a President,"¹³ a singular person, versus "[a]ll legislative Powers herein granted shall be vested in a Congress,"¹⁴ a collective body. Hamilton claimed the enumerated executive powers could not detract from or limit the broad, general powers. The Constitution charged the president to execute the laws, of which, "the laws of Nations as well as the Municipal law" included the "laws of neutrality, when that is the state of the Nation."¹⁵

Hamilton cautioned that had the defensive-oriented Treaty of Alliance included offensive obligations, recognizing the new French government would have placed the U.S. into a state of war. For the good of the nation, the executive's general powers could "affect the proper or improper exercise of the Power of the Legislature to declare war."¹⁶ He went on to declare that the Senate's role in treaties and the legislature's power to declare war were *exceptions* to the executive's general power.¹⁷

¹² House Committee on Foreign Affairs. Subcommittee on National Security Policy and Scientific Developments, *War Powers*, 93d Cong., 1st sess., 1973, 397-400.

¹³ U.S. Constitution, art. 2, sec. 1.

¹⁴ U.S. Constitution, art. 1, sec. 1.

¹⁵ Alexander Hamilton and James Madison, *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding*, ed. Morton J. Frisch (Indianapolis: Liberty Fund, 2007), 8-14, <http://oll.libertyfund.org/titles/hamilton-the-pacificus-helvidius-debates-of-1793-1794> (accessed January 20, 2015).

¹⁶ *Ibid.*, 15.

¹⁷ The argument stands in stunning contrast to the tone of Hamilton's *Federalist* 69 essay detailing the limited powers of the executive. *Ibid.*, 14-17.

In a counter to Hamilton, Madison asserted in *Helvidius I* that the executive's role was to execute laws; treaties were laws and thus belonged primarily to the legislative function. War declarations suspended a nation's normal state of laws and enacted a new set of rules for the executive to guide his interaction with the enemy. Likewise, peace rescinded the laws governing the state of war and reinstated the nation's normal legal stature. Given the centrality of law, any qualification on the executive's general powers would be restrictive, not expansive, in nature.¹⁸

The Constitution clearly gave the power to declare war, without qualification, to Congress. For treaties, the Constitution stressed the criticality of the legislative branch by requiring two-thirds concurrence for adoption instead of a normal simple majority. Madison stressed the enumerated power to ensure the laws were faithfully executed was the "essence of the executive authority."¹⁹ Finally, he reminded readers of Hamilton's own *Federalist 75* arguments that treaties, not fitting clearly in either branch, had more of a legislative character than an executive one.²⁰ Madison's *Helvidius* writings stress the importance of the Congress's Constitutional role in holding executive power in check.

Supreme Court and Limited War

In 1800, the Supreme Court ruled on a case rising from the undeclared 1798-1800 quasi-naval war between America and France. *Bas v. Tingy* confirmed Congress's role in limited wars.²¹ At odds were two laws dictating the amount of money Bas owed Tingy after Tingy's recapture of Bas's ship from a French privateer. The first law, passed in

¹⁸ Ibid., 55-59.

¹⁹ Ibid., 62.

²⁰ Ibid., 60-64.

²¹ Louis Fisher, *Presidential War Power*, 3rd ed., rev. (Lawrence: University Press of Kansas, 2013), 23-25.

June 1798, said if any public armed vessel of the U.S. recaptured ships and goods from French privateers, the original vessel owner owed one-eighth the value of the recapture to the captain of the armed vessel. The second law, passed in March 1799, increased the value of the payment to one-half if the recapture occurred more than ninety-six hours after the original loss; the dilemma surrounded the second law's change in focus from French ships on the high sea to a more generic *enemy* term.²²

The court voted unanimously that a state of war did exist between the two countries, despite the lack of a formal declaration. Justice Bushrod Washington declared two types of public war existed – declared (or *perfect*) and limited (or *imperfect*). The latter included the authority of limited personnel to act in accordance with a specific commission. Further, Congress's declaration of the type of action sanctioned, and clarified, the limited nature of intended hostilities without having to place the nation into a formal state of war.²³ Justice Samuel Chase wrote Congress had authority to declare a general war, governed by the law of nations, or a limited war, governed by municipal laws. As proof, he noted the laws described the limited personnel authorized to act and their restricted operating area. Despite its limited nature, the public and known status between the two nations proved it qualified as a public war.²⁴ Significant to the case, and the broader undeclared naval war, was the fact that Congress enacted these measures as a deliberate alternative to a declaration of war.²⁵ Declared or limited, Congress had the authority to determine whether a state of war existed between two nations.

²² *Bas v. Tingy*, 4 U.S. 37 (1800), <https://supreme.justia.com/cases/federal/us/4/37/case.html> (accessed February 10, 2015), para 2-6, 28.

²³ *Ibid.*, para 18, 21, 27.

²⁴ *Ibid.*, para 29-30.

²⁵ Edward J. Larson, *A Magnificent Catastrophe: The Tumultuous Election of 1800, America's First Presidential Campaign* (New York: Free Press, 2007), 34.

The separation of the power to declare war from the responsibility to lead forces in war was an important one. As stated, the very nature of republican government meant that war as an instrument of American foreign policy served the collective interest of the populace, not the whims of an individual. War and foreign policy in general were tools intended to defend the basic rights of life, liberty, and pursuit of happiness, and not intended to erode personal rights in the name of national defense.²⁶ The legislative branch's enumerated power to declare war served as a restraint on the executive to ensure the public's voice remained central in defense of the country.

²⁶ Walter A. McDougall, *Promised Land, Crusader State: The American Encounter with the World Since 1776* (New York: Houghton Mifflin Company, 1997), 37.

Chapter 3 - Changing Use of War in American Policy

Congress exercises its specified power to declare war judiciously. Only eleven times has the legislative branch voted to place the nation into a formal state of war against a foreign country.¹ Congressional declarations of war in these instances reflected the dominant American belief that war was an anomaly to the norm of a nation at peace. A declaration of war signaled the need for a united effort to restore peace.²

Congressional Protection of Legislative War Powers

Senate opposition to the Treaty of Versailles, and the corresponding League of Nations, at the end of the Great War lent credence to this theory. Proposed collective security requirements departed from American traditions; critics feared the League's charter would supersede the Constitutional war powers pulling the U.S. into unwanted wars.³ The Senate Foreign Relations Committee sent President Wilson fourteen amendments including one that revised the treaty's language to state that only Congress could commit the nation to war or deploy military forces. Wilson declined. Without this change, the Senate refused to ratify the treaty.⁴ In 1945, four senators, half the US delegation, attended the San Francisco conference to draft the United Nations' (UN) Charter. Chapter 7, Article 43 of the resultant charter stated that special agreements

¹ The declarations served five wars: one declaration each for the War of 1812, the Mexican-American War, and the Spanish-American War and eight total declarations for the two world wars. Congress issued individual declarations of war against Germany and Austria-Hungary in 1917 during the First World War. Within a week of the Japanese attack on Pearl Harbor, Congress again declared war individually on Japan, Germany and Italy. It followed those with an additional declarations against Bulgaria, Hungary, and Romania in June 1942. Congressional Research Service, *Instances of Use of United States Armed Forces Abroad, 1798-2014* (Washington DC: Government Printing Office, 2014), 2, 4, 7, 8, 10.

² Thomas G. Mahnken, *United States Strategic Culture*, Defense Threat Reduction Agency Advanced Systems and Concepts Office, 6-7, <http://fas.org/irp/agency/dod/dtra/us.pdf> (accessed February 25, 2015).

³ McDougall, *Promised Land, Crusader State*, 140-141.

⁴ *Ibid.*, 143-144.

between the UN and member nations would be required to gain troop commitments. The special agreements then required ratification by the member state “in accordance with their respective constitutional processes;”⁵ with this caveat included, the Senate approved the Charter. As it had in rejecting the League of Nations Charter in 1919 and 1920, Congress acted to guard its authority to declare war.⁶

Executive Branch Assumes Primacy

Since World War II, Congress has not formally declared war against another state. The onset of the nuclear age made it clear that any declared war between nuclear powers would become Clausewitz’s notion of absolute war.⁷ A declaration of war gave the state every legitimate authority to use force to defeat the enemy state, including the use of nuclear weapons. The outcome of a nuclear exchange promised mutual annihilation. John Lewis Gaddis, in his history of the Cold War, noted the fear of nuclear escalation forced politicians to wrestle with Clausewitz’s notion that war was both a continuation of policy and was, by necessity, constrained by it. War was still intended to serve political goals; therefore, it could not cross the nuclear threshold. War had to be limited and controlled to prevent escalation to an unwanted nuclear exchange. To avoid this potentially fatal act, states by necessity refrained from making formal declarations of war.⁸

When Soviet Premier Joseph Stalin gave his approval to North Korean leader Kim Il-Sung to launch a war to reunite the Korean peninsula, President Harry S. Truman was

⁵ Fisher, *Presidential War Power*, 80-83, 87-91.

⁶ *Ibid.*, 80.

⁷ Carl von Clausewitz, *On War*, ed. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1984), 75-78.

⁸ Joseph Stalin also feared allowing war to reach nuclear escalation because it risked his own loss of power for failing to take the horrendous consequences on the populace seriously. John Lewis Gaddis, *The Cold War: A New History* (New York: The Penguin Press, 2005), 48-60.

determined not to let the postwar security order fail and worked to bolster the authority of the newly created UN to preserve peace and stop aggression.⁹ Truman used the UN Security Council (UNSC) as his authority for military action. He took this action despite a pledge he made during the 1945 Congressional UN Charter debate that he would seek the legislative branch's approval before committing American forces to war under the international body.¹⁰

A small group of Congressional leaders, swept up in the passion surrounding the invasion, facilitated this action and in essence ceded the legislature's Constitutional responsibility to the president. Congressional leaders told Truman to proceed on his own authority without worrying about a war resolution.¹¹ Emboldened and hoping to avoid potential escalation to a greater Asiatic war with the Soviets or Communist China, Truman refused to call Korea a war. He unilaterally committed troops to a "police action" two days before the UNSC asked nations to contribute military forces to repel the North Korean attack.¹² Although there were some in the White House urging the president to request a war resolution, Truman and Secretary of State Dean Acheson relied instead on the president's authority as commander-in-chief. The commander-in-chief could act within his Constitutional power to protect the nation from a threat to its security. The

⁹ Ibid., 40-43.

¹⁰ Fisher, *Presidential War Power*, 89-90.

¹¹ David McCullough, *Truman* (New York: Simon & Schuster Paperbacks, 1992), 780.

¹² Ibid., 782-783; Senator Claude Pepper, during the 1943 senatorial debates on creating the UN, proposed that the US president unilaterally be allowed to use the American military as a "police force" to counter aggression in small conflicts but require Congressional approval before the international body committed US forces to war. President Franklin D. Roosevelt also used the police analogy in an attempt to sway Congress to give the President standing authority to act militarily to preserve peace. Fisher, *Presidential War Power*, 85-86, 95-98.

Constitutional issue of balance of power was less important than a president's ability to meet international crises.¹³

Less than a year after the signature of the Korean armistice in 1953, President Dwight D. Eisenhower used Constitutional constraints to limit US involvement in French Indochina. Eisenhower favored a nuanced US-British approach that relied on air power and military hardware to support the French. His decision to commit 10 bombers and 200 personnel drew concerns from Republicans about the executive branch involving the nation in another war by incremental steps. Eisenhower, however, set six conditions for US participation. The most stringent were full and prior Congressional approval before the deployment of any combat forces and the participation of British and regional allies.¹⁴

As the French position at Dien Bien Phu worsened in early April 1954, the administration approached Congress for a resolution supporting action. Congress rebuffed the request citing "No more Koreas" and established its own requirements – allied participation coupled with French promises of Vietnamese independence.¹⁵ Three days later, the French sought potential use of atomic weapons against the Vietminh. Eisenhower replied such a strike would be impossible without prior Congressional approval and was entirely unconstitutional.¹⁶ Eisenhower used his executive power as commander-in-chief to authorize limited force deployments, and his prerogative as chief executive to negotiate with the French and British on the development of a collective security arrangement in Southeast Asia to counter communist expansion. However, he

¹³ McCullough, *Truman*, 789.

¹⁴ Stephen E. Ambrose, *The President*, vol. 2 of *Eisenhower* (New York: Simon and Schuster, 1984), 173-177.

¹⁵ *Ibid.*, 178.

¹⁶ *Ibid.*, 179.

made it clear that the formal decision to authorize large military action, especially action that could result in nuclear exchange, rested with Congress under its Constitutional responsibility. Only Congressional authorization could guarantee national unity.¹⁷

Gulf of Tonkin Resolution – Ambiguous Intent vs Clear Authority

A decade later, a different Congress and a different president cooperated to enable the introduction of military force into Indochina in August 1964. Following one clear and one ambiguous North Vietnamese attack against the *USS Maddox* in the Gulf of Tonkin, Congress passed a resolution granting the president authority to employ military force to repel attacks, prevent aggression, and take actions to defend treaty partners in Southeast Asia with an expiration date of his own determination.¹⁸ In his request, Johnson asked for political unity in “supporting freedom and in protecting peace in [S]outheast Asia.”¹⁹ His intent was fourfold: honor American commitments, protect the future of Southeast Asia as a whole, seek peace, and help South Vietnam and Laos “repel aggression and strengthen their independence.”²⁰ Johnson concluded by noting the U.S. sought no expansion of the war, but merely aimed to see the conditions outlined in the 1954 Geneva agreements honored following French withdrawal from the region.²¹

The Tonkin Resolution clearly gave the executive broad powers. Section 2 of the resolution stated explicitly:

Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as

¹⁷ Ibid., 178-185.

¹⁸ Robert Dallek, *Lyndon B. Johnson: Portrait of a President* (New York: Oxford University Press, 2004) 176-179; The Avalon Project, *The Tonkin Gulf Incident; 1964*. http://avalon.law.yale.edu/20th_century/tonkin-g.asp (accessed January 8, 2015).

¹⁹ The Avalon Project, *The Tonkin Gulf Incident; 1964*. President Johnson’s message para 2.

²⁰ Ibid., para 6-9.

²¹ Ibid., para 13.

*the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.*²²
[emphasis added]

While not a formal declaration of war, the resolution's reference to the Constitution and passage by both houses made it clear that Congress authorized military action. However, Congress gave the president complete charge of the war as commander-in-chief. The president owned the war's limits and extent as long as affected states requested assistance. Thus, the president could decide what circumstances constituted those conditions. Furthermore, the authorities granted expired primarily by presidential determination of international conditions. The legislative branch handed the executive a blank check to introduce forces that would oblige Congress to outfit "Johnson's War."²³

Debate lasted two days despite a lack of Congressional understanding on what the resolution intended to achieve – deter aggression or authorize escalation. Senator Gaylord Nelson sought an amendment preventing Johnson from expanding the current conflict. Senator J. William Fulbright, the floor manager for the resolution, believed the resolution intended to prevent a larger war and rejected the amendment.²⁴ Even as the resolution passed quickly in the interest of responding decisively to a perceived direct threat to the U.S., a number of voices in the Senate expressed concerns over the ramifications of the resolution.²⁵ Johnson fought his war without solid Congressional support, costing him

²² Ibid., Joint Resolution of Congress, Section 2.

²³ Dallek, *Lyndon B. Johnson*, 210-212, 217-220, 224-226.

²⁴ Fulbright thought Nelson's amendment might delay passing the resolution and it closely matched President Johnson's public statements on US policy towards the region. Fisher, *Presidential War Power*, 128-130.

²⁵ Senator Jacob Javits noted voting to support the resolution required the full knowledge that it could start actions resulting in "many hundreds or thousands" of casualties. The resolution's clear language and the Senate's prescient, while brief, debate undermined the credibility of future critics who regretted their vote in support of presidential action in Indochina. Senate Committee on Foreign Relations, *War Powers Legislation, 1973*, 93rd Cong., 1st sess., 1973, 302-304.

future political influence. He paid the ultimate political price and did not pursue a second term.²⁶

Nixon and Cambodia

Five years later, President Richard Nixon's actions ending the Vietnam War sparked Congress to take action. Two months after his inauguration, Nixon sought to establish a negotiating position of strength. He authorized the secret bombing of neutral Cambodia to cut the Ho Chi Minh trail and isolate communist forces in South Vietnam from North Vietnamese support. In May 1969, Nixon publicly briefed "Vietnamization"; his aim was to remove all US troops by the end of 1970. He viewed Eisenhower's approach to getting a Korean armistice, strengthened by a capable South Korean military force, as the model to follow, but the South Vietnamese military was not an equivalent deterrent. Nixon felt compelled to expand the war into Cambodia and Laos, to gain time and space for Vietnamization to work and to force the North Vietnamese to negotiate. He hoped the expansion's effects would provide a sense of victory despite withdrawal.²⁷

Cambodia offered Nixon a messy solution to a complex problem. He had to compel Hanoi to negotiate earnestly, yet each major troop withdrawal announcement strengthened the North Vietnamese will to delay. Many on his staff, to include the secretary of state and secretary of defense, saw no long-term benefit to a prolonged presence in the region. Nixon and Henry Kissinger, the president's National Security Advisor, developed the Cambodia plan mainly in isolation. They ordered the few outsiders who attended the meetings to maintain secrecy and brushed aside suggestions to

²⁶ Dalleck, *Lyndon B. Johnson*, 325, 329-332.

²⁷ Stephen E. Ambrose, *The Triumph of a Politician 1962-1972*, vol. 2 of *Nixon* (New York: Simon and Schuster, 1989), 256-258, 277-279, 324-325, 335-336, 339-346.

consult Congress. When the duo briefed the full National Security Council, the secretary of state opposed the idea and an indifferent secretary of defense warned of higher casualties and political fallout. Nixon was convinced he should be aggressive; a half-hearted effort would prompt just as much political ire.²⁸ Nixon brought his case to the public in a televised address to the nation on April 30, 1970.²⁹ “[If] the world’s most powerful nation . . . acts like a pitiful, helpless giant, the forces of totalitarianism and anarchy will threaten free nations and free institutions throughout the world. . . . our will and character [are] being tested tonight.”³⁰ His inference of national honor and petition for courage were classic appeals to aspects of the *Jacksonian* foreign policy approach.

²⁸ Conrad Black, *Richard M. Nixon: A Life in Full* (New York: PublicAffairs, 2007), 663-664, 666-668, 670.

²⁹ Ambrose, *Nixon*, 344-346.

³⁰ Black, *Richard M. Nixon*, 670.

Chapter 4 - A Call to Action

The constitutionality and legal authority for the Cambodian incursion came into question immediately. Congress repealed the Tonkin Resolution as an amendment to the Foreign Military Sales Act in January 1971.¹ Nixon told the public he based his rationale for continued action in Cambodia on destroying enemy war material in the country.² Nixon also maintained he did not need the resolution to justify his military action.³ Nevertheless, the proponents of war powers legislation were infuriated.

Senator Thomas Eagleton captured the Constitutional dilemma perfectly. It was the repeal, not the passage, of the Tonkin Resolution that gave rise to the controversy. Without the resolution, Congress had no viable counter to the president's authority as commander-in-chief to act in Cambodia without deliberately eliminating funding for troops in combat. Eagleton warned Congress that if it chose to ignore the current peril, future executives would present Congress with a military *fait accompli* to ratify or reject. "The President cannot be allowed to initiate hostilities at will," Eagleton said, "and then force Congress to muster a two-thirds majority of both Houses to stop him."⁴ Nixon's actions demonstrated his complete belief in executive primacy for employing military force in support of foreign policy. That belief was the final catalyst for legislative action to restore Constitutional balance.

¹ *An Act to amend the Foreign Military Sales Act*, Public Law 91-672, § 12, 91st Cong., 2d sess. (January 12, 1971), 2055.

² House Committee on Foreign Affairs. Subcommittee on National Security Policy and Scientific Developments, *Congress, The President, and the War Powers*, 91st Cong., 2d sess., 1970, 501.

³ Ambrose, *Nixon*, 338-339.

⁴ House Committee on Foreign Affairs. Subcommittee on National Security Policy and Scientific Developments, *War Powers*, 93rd Cong., 1st sess., 1973, 30.

Competing Views

By March 1973, Congress held its third round of hearings on war powers legislation. Barry Goldwater staunchly opposed the effort. He highlighted 197 instances of involvements in military hostilities abroad despite only five declared wars.⁵ At least 111 uses of force relied on executive authority solely without an underpinning treaty or legal statute, 81 instances involved fighting or the threat thereof, 93 instances lasted more than 30 days, and 100 instances saw the use of troops outside the Western Hemisphere.⁶ Goldwater claimed that Congress's refusal to block a single action demonstrated the proper execution of the war powers as envisioned by the framers.⁷

Harvard law professor Raoul Berger responded that usage and precedent were extra-Constitutional and unfounded given the framer's writings, concluding, "Illegality is not legitimated by repetition."⁸ Precedence attempted to avoid the difficult amendment process.⁹ The Supreme Court ruled in 1892 that Congress could not delegate its powers to the executive branch.¹⁰ Thus, if Congress could not give away its power, the executive could not take legislative power without a Constitutional amendment.¹¹

Yale law professor Eugene Rostow, former Undersecretary of State for Political Affairs under President Johnson, also opposed the effort. He cited the *Pacificus* debates and historical analysis from political scientist Edward Corwin's 1917 examination of

⁵ See footnote 1 in Chapter 3. Congress declared war on a nation eleven times in support of five distinct wars.

⁶ House. Subcommittee on National Security Policy and Scientific Developments, *War Powers*, 425-426.

⁷ *Ibid.*, 426, 447.

⁸ Senate Committee of Foreign Relations, *War Powers Legislation*, 1973, 9-10.

⁹ *Ibid.*, 16.

¹⁰ *Field v. Clark*, 143 U.S. 649 (1892), <https://supreme.justia.com/cases/federal/us/143/649/case.html> (accessed February 10, 2015).

¹¹ Senate Committee of Foreign Relations, *War Powers Legislation*, 1973, 10.

Congress's debate on President Wilson's foreign policy.¹² Corwin observed that since Washington's presidency, the executive branch filled the Constitutional gaps in foreign policy powers.¹³ Those who supported Congressional action rejected Rostow's view. Congressional concerns over the Korean War and the expansion of the Vietnam War did not occur because of Constitutional gaps. The UN Charter, and subsequent Southeast Asia Collective Defense Treaty, explicitly required member nations use their Constitutional process to authorize the use of force.¹⁴ In the cases of Korea and Cambodia, the executive ignored the process.

The War Powers Resolution

Congress passed the War Powers Resolution (WPR) over Nixon's veto in November 1973. The WPR drew its authority from the Constitution's necessary and proper clause in Article I, Section 8. The clause empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution [its enumerated powers], and *all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof* [emphasis added]." The WPR limited the commander-in-chief enumerated power to three specific cases – formal declaration of war, clear legislative authorization, or an attack upon US territories or armed forces.¹⁵

Section 3 of the resolution required executive consultation with Congress before the introduction of military forces into hostilities or conditions indicating imminent

¹² House. Subcommittee on National Security Policy and Scientific Developments, *War Powers*, 400-402.

¹³ Edward S. Corwin, *The President's Control of Foreign Relations* (Princeton: Princeton University Press, 1917), 6.

¹⁴ See Article IV, paragraph 1. The Avalon Project, Yale Law School, "Southeast Asia Collective Defense Treaty (Manila Pact); September 8, 1954," http://avalon.law.yale.edu/20th_century/usmu003.asp (accessed March 6, 2015).

¹⁵ *War Powers Resolution*, Public Law 93-148, § 2(c), *U.S. Statutes at Large* 87 (1973): 555.

hostilities.¹⁶ The House Committee on Foreign Affairs' report accompanying the draft resolution explained *consultation* was to be a full sharing of information. The president was to make all pertinent data available, consider Congressional opinions, and gain approval before acting. Further, Congress intended *hostilities* to apply to both actual combat and potential of combat.¹⁷ However, the final version did not contain the terms clarified intent, unwittingly giving the executive exceptional leeway in practice.

Absent a declaration of war, Section 4 required the president to notify the leader of the House and Senate by report within forty-eight hours of introducing troops into three scenarios: (1) hostilities or situations where hostilities are imminent, (2) foreign nations when equipped for combat unless the deployment was related to "supply, replacement, repair, or training," and (3) when the action greatly increased the number of combat equipped forces already present in a foreign nation.¹⁸ Under the first scenario, the WPR granted the president sixty days before the law required removal of military forces, unless Congress was physically unable to convene or granted specific statutory authority. The president gained an additional thirty days with a certification to Congress that military necessity required additional time to extract committed forces safely. No automatic withdrawal mechanism existed for the latter two scenarios.¹⁹

Congress chose to use a concurrent resolution as the ultimate mechanism to force withdrawal regardless of the scenario.²⁰ Concurrent resolutions do not require executive

¹⁶ The section's language created a loophole by qualifying the requirement as "in every possible instance;" it also mandated recurring consultation with Congress for the length of hostilities. *Ibid.*, § 3, 555.

¹⁷ House Committee on Foreign Affairs. Subcommittee on International Security, International Organizations and Human Rights, *The War Powers Resolution: Relevant Documents, Reports, Correspondence*, 103rd Cong., 2d sess., 1994, 29.

¹⁸ *War Powers Resolution*, § 4, 555-556.

¹⁹ *Ibid.*, § 5, 556-557.

²⁰ *Ibid.*

approval, and thus do not seemingly carry the weight of a law. Yet, precedence existed. Multiple World War II acts delegated increased powers to the executive branch and used the concurrent resolution mechanism to repeal the delegation of authority.²¹ Opponents of the WPR use the Supreme Court's 1983 ruling in *INS v. Chadha* to point out Congress can "control executive actions only by presenting a bill or joint resolution to the President for signature or veto."²² WPR proponents claim the ruling applies only to areas where Congress delegated its legislative authority. The WPR does not delegate that authority.²³ Congress explicitly used the historically proven concurrent resolution as a balance to presidential assumption of Congressional powers in committing the nation to war.²⁴

Section 8 established that the executive could not assume authority to commit forces from any previous or future law or treaty unless the implementing legislation contained language that specifically granted the authority consistent with the WPR. While the resolution allowed for continued military member service in multinational headquarters previously established by the UN Charter or ratified treaty, it did not grant authority to assign military members to "command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government" while engaged in or threatened by hostilities.²⁵

At no instance does the resolution differentiate between conventional or special operations forces. However, the irregular force reference in Section 8 would apply to US

²¹ The Lend-Lease Act, First War Powers Act, Emergency Price Control Act; Stabilization Act of 1942, and War Labor Dispute Act used to concurrent resolutions to repeal delegated powers to the president. House. Subcommittee on International Security, International Organizations and Human Rights, *The War Powers Resolution: Relevant Documents, Reports, Correspondence*, 36.

²² Fisher, *Presidential War Power*, 150.

²³ *Ibid.*, 299-301.

²⁴ House. Subcommittee on International Security, International Organizations and Human Rights, *The War Powers Resolution: Relevant Documents, Reports, Correspondence*, 36.

²⁵ *War Powers Resolution*, § 8, 558.

special operations forces conducting certain aspects of unconventional warfare (UW), foreign internal defense (FID), or security force assistance (SFA) activities in foreign countries.²⁶ Further, the executive could avoid mandatory reporting requirements by expressing these particular missions as training deployments allowed under the second scenario of Section 4.

Finally, Section 8(d) muddled the intent and impact of the WPR. It asserted that nothing “alter[ed] the constitutional authority of the Congress or of the President” while subsequently stating the president had no new authority to commit forces to hostilities had the resolution not passed.²⁷ In fact, Section 5(b) gave the president sixty days to act without constraint unless Congress forced a troop withdrawal through legislation.

The resolution appalled Senator Eagleton. Instead of restraining the executive, the resolution actually reinforced the executive branch’s prerogative to commit forces unilaterally under the president’s power as commander-in-chief. Eagleton wondered aloud to his fellow legislators how they could grant the president unilateral authority to wage war for up to ninety days so soon after the nation’s experience in Vietnam and Cambodia. The WPR was a “menace” to Congress’s authority to declare war and balance executive power to employ military force in a manner tantamount to war.²⁸

²⁶ For further details on these activities, see U.S. Joint Chiefs of Staff, *Special Operations*, Joint Publication 3-05 (Washington DC: Joint Chiefs of Staff, July 16, 2014), II-8-II-12.

²⁷ *War Powers Resolution*, § 8, 558.

²⁸ Fisher, *Presidential War Power*, 147.

Chapter 5 - Real World Assessment

Eagleton's predictions have come true. The WPR, a prototypical Jeffersonian-style congressional constraint on American foreign policy, did not have the intended effect.¹ A 2014 Congressional Research Service report highlights 175 instances of American military force used abroad since the WPR's passage.² In the forty years since, President Gerald Ford is the only executive to report the introduction of forces into hostilities in accordance with Section 4(a)(1), the section triggering the sixty-day time limit. Ford's after the fact report covered the short-lived military action regarding the *SS Mayaguez* seizure by Khmer Rouge elements in international waters.³

Only on one other occasion did Congress act to establish the Section 4(a)(1) trigger date – with the Multinational Force in Lebanon Resolution signed by President Ronald Reagan.⁴ Reagan initially dispatched Marines to Lebanon in August 1982 and reported it consistent with the WPR, but did not refer to the sixty-day time limit. Fourteen months later, following a mission change and the death of two Marines, Congress passed

¹ Mead, *Special Providence*, 191.

² Congressional Research Service, *Instances of Use of United States Armed Forces Abroad, 1798-2014*, 11-33.

³ In addition to the *Mayaguez* rescue, President Ford reported to Congress on three occasions in April 1975 regarding evacuation operations supporting refugees, US embassy personnel, and US citizens from Cambodia and Vietnam before the fall of Saigon. During ongoing meetings, congressional leaders made it clear to Ford they would not support continued military and economic assistance to the faltering government of South Vietnam. They would support funds for evacuations; the after the fact reports should not have been a surprise to Congress. Yanek Mieczowski, *Gerald Ford and the Challenges of the 1970s* (Lexington: University Press of Kentucky, 2005), 291-293. Congressional Research Service, *The War Powers Resolution: After Thirty-Eight Years*, (Washington, DC: Government Printing Office, 2012), 52-53.

President Jimmy Carter's sole report came after the failed secret attempt to rescue embassy personnel held hostage in Iran. Carter claimed authority from two sources – his role as commander-in-chief, referencing the WPR's ambiguous Section 8(d) that did not alter constitutional authority, and the UN Charter's Article 51 right to self-defense. House Committee on Foreign Affairs. Subcommittee on International Security, International Organizations and Human Rights, *The War Powers Resolution: Relevant Documents, Reports, Correspondence*, 103rd Cong., 2d sess., 1994, 55-57.

⁴ Congressional Research Service, *The War Powers Resolution: After Thirty-Eight Years*, Summary; *Multinational Force in Lebanon Resolution*, Public Law 98-119, § 2(b), *U.S. Statutes at Large* 97 (1983): 805.

the Lebanon Resolution establishing the trigger date while giving the president authority for an additional eighteen months.⁵

Reagan signed the resolution but asserted that neither the WPR's sixty-day limit nor the Lebanon resolution's eighteen-month time restriction could, nor would he allow them to, impede the president's Constitutional authority as commander-in-chief to deploy military force in pursuit of national security interests. Reagan thanked Congress for its support, but made it clear that he not would allow Congress to limit his authority.⁶

The actions of President Ford and President Reagan highlight the consistent executive exercise of war powers. When using short-term military force (limited war in the Supreme Court's *Bas v. Tingy* decision construct), presidents often acted unilaterally within the executive power of commander-in-chief, as Senator Eagleton predicted.⁷ As a result, the executive repeatedly relegated Congress to the unwinnable position of stopping presidential action through legislation once US forces faced imminent danger. Thus, the political costs paid by Congress to force a president to halt military action would be too great to bear and could potentially damage larger national security interests. By giving the president unlimited authority to wage war for sixty days, Congress tried to balance that authority through reporting and consultation requirements and delimiting the term

⁵ Congressional Research Service, *The War Powers Resolution: After Thirty-Eight Years*, 53; *Multinational Force in Lebanon Resolution*, § 2, § 6, 805, 807.

⁶ "Statement on Signing the Multinational Force in Lebanon Resolution," *Public Papers of the Presidents of the United States: Ronald Reagan: 1983*, no. 2 (Washington DC: Government Printing Office, 1985), 1444-1445. Originally intended as a short-duration peacekeeping mission to assist in separating warring Israeli and Syrian forces, hostilities directed at Marines on the ground changed the reality of Lebanon mission into a 19-month murky combat zone that resulted in 266 dead and 151 wounded Americans. Peter Huchthausen, *America's Splendid Little Wars: A Short History of U.S. Military Engagements: 1975-2000* (New York: Viking, 2003), 45-63.

⁷ Fisher, *Presidential War Powers*, 154.

hostilities. Instead, presidents have given symbolic responses to Congress. Beginning with Ronald Reagan, the executive has asserted its authority at the expense of Congress.

Short-Term Uses of Military Force

After signing the order for 1,900 ground personnel to invade Grenada, Reagan briefed Congressional leaders in the late evening of October 24, 1983.⁸ In his letter to House leaders the next day, Reagan stated the invasion's purpose was to augment a 300-man Organization for Eastern Caribbean States' military contingent to restore law and order and assist the protection and evacuation of American citizens. Reagan stated his authority came from his role as commander-in-chief and responsibility to lead foreign policy. While tacitly acknowledging the WPR, he intended his report only to inform Congress of his decision.⁹

The House voted 403 to 23 to start the WPR's sixty-day clock on October 25, 1983. The Senate was poised to pass a similar bill. In response, the administration pledged to have troops out before the time limit expired on December 23. Given the assurance, Congress failed to pass any resolution. Eleven congressmen later sued the president in federal district court stating that Reagan violated the Constitution. The court dismissed the case because Congress had not acted first as a collective body to force the

⁸ Congressional Research Service, *War Powers Resolution: After Thirty-Eight Years*, 54.

⁹ "Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Forces in Grenada," *Public Papers of the Presidents of the United States: Ronald Reagan: 1983*, no. 2, 1512-1513. Casper Weinberger noted one administration interest was self-serving – restoring American honor and hope following debacles with Iran and in Lebanon. Huchthausen, *America's Splendid Little Wars*, 75.

withdrawal of troops.¹⁰ The last US troops left Grenada on December 15, 1983 within the WPR's sixty-day mandated timeline, but under presidential, not congressional order.¹¹

President George H.W. Bush secured his own Grenada-type operation with the invasion of Panama to extradite Manuel Noriega and protect American citizens. Like Reagan, Bush told Congressional leaders in the evening of December 19, 1989, after he made the decision to commence the invasion early the next morning.¹² In his report to Congress two days later, Bush cited Noriega's declaration of a state of war with the U.S. on December 15, the death of a US Marine and assault on a naval officer, and the general threat to the large American population in Panama as justification. He listed four objectives: protect American citizens, defend Panamanian democracy, capture Noriega and bring him to trial for drug-related charges, and protect the Panama Canal treaties. As authorization, Bush used the UN Charter's Article 51 right to self-defense, along with his Constitutional role as commander-in-chief and responsibility to conduct foreign relations. In regards to the WPR, Bush desired Congress simply be informed of the *fait accompli*, noting that most organized resistance had ceased, but a final determination on duration of military operations could not yet be made.¹³

¹⁰ The plaintiffs appealed to the US Court of Appeals for the District of Columbia but it sided with the lower court mainly because the issue was moot once the invasion concluded. Congressional Research Service, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution* (Washington, DC: Government Printing Office, 2012), 5-6; Fisher, *Presidential War Powers*, 162-163.

¹¹ Administration members suggested Grenada restored vigor to American foreign policy. Huchthausen, *America's Splendid Little Wars*, 85.

¹² Congressional Research Service, *War Powers Resolution: After Thirty-Eight Years*, 55.

¹³ House. Subcommittee on International Security, International Organizations and Human Rights, *The War Powers Resolution: Relevant Documents, Reports, Correspondence*, 144-145.

Popular support for the invasion and the rapid, low cost conclusion of operations made Congressional fulminations about disregarding the WPR moot.¹⁴ Politically trapped by Bush, the House attempted to play both sides of the issue, passing a resolution 389 to 26 that praised the president's actions while restating the US government's commitment not to interfere with foreign governments' internal affairs. The Senate took no action.¹⁵

President Bush seized the political high ground by laying out four broad strategic objectives. The president's decision to employ force was indeed a *fait accompli*, but unlike previous presidents, Bush justified military action as commander-in-chief for solely US strategic interests: protect the Panama Canal, bring violators of US law to justice, and protect American citizens. Bush made an unimpeachable argument for executive authority to use military force without the need for Congressional approval. Depending on what the president determined to be a US strategic interest, he had authority to act. Congress could never disapprove such a rationale for the use of force. From this point on, the president would have the sole decision power for committing the nation to war.

The 1990s saw multiple *Wilsonian* executive military actions. Space limits this thesis to two studies: Somalia and Bosnia. After Bill Clinton criticized Bush during the 1992 debates for failing to act in the Balkans and promising to send troops to Somalia, Bush committed ground forces to the latter.¹⁶ Bush's press secretary released a statement on December 3, 1992 in which the administration thanked the UN for authorizing the use

¹⁴ Eileen Burgin, "Congress, the War Powers Resolution, & the Invasion of Panama," *Polity* 25, no. 2 (winter 1992): 237-240, <http://www.jstor.org/stable/3235109> (accessed February 25, 2015).

¹⁵ Fisher, *Presidential War Powers*, 166.

¹⁶ Richard Sale, *Clinton's Secret Wars: The Evolution of a Commander in Chief* (New York: St Martin's Press, 2009), 76.

of military force to deliver aid.¹⁷ The next day, Bush told the nation US pilots had flown over 1,400 aid sorties in previous months but the security situation was deteriorating. He noted the desire to save lives and counseled that America needed to give the children of Somalia hope. The military mission was to create a secure environment for food delivery before turning it over to an international peacekeeping force. At the time of the address, he had already given the order to the Pentagon to deploy forces.¹⁸ US forces landed in Somalia on December 8, 1992; Bush reported their arrival to Congressional leaders two days later in a letter consistent with the WPR. He noted the administration did not intend for the forces to get involved in hostilities, although previous statements about the deteriorating security situation implied the peril existed, and cited his constitutional authorities to lead foreign relations and role as commander-in-chief.¹⁹ Bush's report to Congress listed House and Senate concurrent resolutions expressing support.²⁰

Newly inaugurated as president, Bill Clinton continued the Bush involvement in Somalia. By late summer 1993, the peacekeeping mission involved active hostilities after a local warlord killed twenty-three Pakistani and eight American soldiers in separate incidents. Clinton officials began to speak of nation building which enraged certain critics. In October 1993, eighteen American soldiers died during a two-day battle in Mogadishu. Congress pressured Clinton to withdraw troops and put the compromised

¹⁷ "Statement by Press Secretary Fitzwater on the United Nations Vote To Authorize Use of Military Forces in Somalia," *Public Papers of the Presidents of the United States: George Bush: 1992-1993*, no. 2 (Washington DC: Government Printing Office, 1993), 2174.

¹⁸ "Address to the Nation on the Situation in Somalia," *Public Papers of the Presidents of the United States: George Bush: 1992-1993*, no. 2, 2174-2176.

¹⁹ "Letter to Congressional Leaders on the Situation in Somalia," *Public Papers of the Presidents of the United States: George Bush: 1992-1993*, no. 2, 2179-2180.

²⁰ Bush referenced H. Con. Res. 370 and S. Con. Res. 132. "Letter to Congressional Leaders on the Situation in Somalia," *Public Papers of the Presidents of the United States: George Bush: 1992-1993*, no. 2, 2180.

date of March 31, 1994 into the defense appropriations bill. Clinton honored the Congressional restriction.²¹

The American involvement in Somalia led to much discussion in Congress. Multiple resolutions and bills in each house lending support for use of force before and after the fact implied partial legislative support for presidential war. If the humanitarian relief mission in Somalia, and its potential hostilities, was a national interest and not solely an executive one, Congress should have been able to pass an authorization for the use of force. If the mission was not a true national interest, but a feeble attempt only to treat symptoms of the underlying conflict, Congress should have acted to curtail the US involvement in accordance with the construct in the WPR. In essence, it did neither.

The bloody disintegration of Yugoslavia with acts of genocide also pulled the Clinton administration into a half-hearted *Wilsonian* war in the Balkans. Reluctant to get involved, Bush refused to use forces without prior Congressional approval, claimed it was not vital to national interests, and instead sought a UN resolution to authorize the use of force for the delivery of aid before leaving office.²² Clinton made the first of thirty-three total reports to Congress consistent with WPR regarding the Balkans shortly after his inauguration in April 1993 when he announced the establishment of a no-fly zone over Bosnia.²³ Over the next seven years, US military mission sets in the Balkans included no-fly zones, peacekeeping, peace enforcement, protection of safe areas, enabling force for follow-on peace agreement implementation, implementation force, and stabilization force. Over half of the thirty-three reports to Congress consistent with the

²¹ Fisher, *Presidential War Powers*, 176-178.

²² Sale, *Clinton's Secret Wars*, 23-26, 40.

²³ Congressional Research Service, *War Powers Resolution: After Thirty-Eight Years*, 56-64.

WPR spoke directly, or alluded, to hostilities and should have triggered the sixty-day timeline for automatic withdrawal without additional statutory approval.²⁴

Again, Congress executed a muddled approach by failing to reach legally binding consensus on deploying US military force. Congress included nonbinding “Sense of the Senate” or “Congress” language in multiple appropriations acts that the executive should not use funds to deploy forces to enforce a peace settlement or conduct peacekeeping operations on the ground without prior Congressional approval.²⁵ On October 30, 1995, the House had a long debate on nonbinding House Resolution (HR) 247 that stated it was the sense of the House no troops should deploy for peace enforcement without specific legal approval; it passed 315 to 103.²⁶ On November 17, the House voted 243 to 171 for a binding resolution derived from HR 247. Both sides discussed authority to deploy troops, micromanaging foreign policy, and undermining the developing peace negotiations.²⁷ Four days later, Clinton announced the Dayton Peace Accord and echoed the consistent theme of his predecessors. After reviewing the negotiated implementation plan, he would consult with Congress, welcome their support, and promised not to execute the full deployment until after hearing Congress. He did not mention seeking Congressional authorization.²⁸ The Senate rejected a House bill that prohibited the use of

²⁴ Clinton never cited Section 4(a)(1) of the WPR and avoided the clock. Unlike Lebanon, Congress did not establish a start date consistent with the applicable section. Congressional Research Service, *War Powers Resolution: After Thirty-Eight Years*, 29-32, 56-64.

²⁵ *Department of Defense Appropriations Act of 1994*, Public Law 103-139, § 8146, *U.S. Statutes at Large* 107 (1993): 1474; *Department of Defense Appropriations Act, 1995*, Public Law 103-335, § 8100, *U.S. Statutes at Large* 108 (1994): 2643; *Department of Defense Appropriations Act, 1996*, Public Law 104-61, § 8124, *U.S. Statutes at Large* 109 (1995): 678. *Omnibus Consolidated Rescissions and Appropriations Act of 1996*, Public Law 104-134, § 408, *U.S. Statutes at Large* 110 (1996): 1321-45.

²⁶ *Cong. Rec.*, 104th Cong., 1st sess., 1995, 141, no. 169: H11398-H11409, H11421.

²⁷ *Cong. Rec.*, 104th Cong., 1st sess., 1995, 141, no. 183: H13223-H13248.

²⁸ “Remarks Announcing the Bosnia-Herzegovina Peace Agreement and an Exchange With Reporters,” *Public Papers of the Presidents of the United States: William J. Clinton: 1995*, no. 2 (Washington DC: Government Printing Office, 1996), 1776-1778.

defense funds for the Bosnian deployment unless appropriated by law. By mid-December, the House was also rejecting proposals specifically aimed at defunding the deployment. Instead, both houses passed measures expressing support for the troops.²⁹

The presence of US forces in the Balkans peaked in December 1995 with the ordered deployment of 25,000 personnel to Bosnia and Croatia as part of North Atlantic Treaty Organization's Implementation Force supporting the Dayton Peace Accords. On December 21, Clinton notified Congress he directed US forces participate in the implementation force based on his constitutional authority to lead foreign policy and role as commander-in-chief. He expected the duration to be a year.³⁰ The same day, Representative Jay Kim expressed his sense of helplessness; "Congress does not have any power to send the troops to Bosnia. We passed a resolution three times and sent it to Mr. Clinton not to send troops. He did it. Yes, he has the power. Congress does not."³¹ Legally, Kim was incorrect; however, he captured the essence of Congressional inability to stop another presidential war. In March 1998, Clinton removed any end date for the mission in Bosnia, a mission originally supposed to conclude in 1996.³²

The *Wilsonian* foreign policy approach to small-scale wars surfaced this decade when Libyan dictator Muammar Qaddafi acted to quell demonstrations erupting as part of the Arab Spring movement in February 2011. Despite his advisors voting seven to four against intervention, President Barack Obama embraced military action to prevent genocide. The idea was another no-fly zone; Secretary of Defense Robert Gates made

²⁹ Fisher, *Presidential War Powers*, 189-190.

³⁰ "Letter to Congressional Leaders on the Deployment of United States Military Forces for Implementation of the Balkan Peace Process," *Public Papers of the Presidents of the United States: Administration of William J. Clinton*: 1995, no. 2, 1917-1918.

³¹ *Cong. Rec.*, 104th Cong., 1st sess., 1995, 141, no. 207: H15622.

³² Fisher, *Presidential War Powers*, 190.

clear in Congressional testimony that a no-fly zone required an initial act-of-war to degrade Libya's air defense. Gates later testified about needing Congressional assistance in limiting the US military role as he did not think the nation should take on a third concurrent war, one that he did not view as in the nation's vital interests.³³ Obama met with Congressional leaders in mid-March to discuss the operation. The Senate had already voted unanimously on a resolution calling on the UNSC to authorize a no-fly zone and many in the House voiced support for action. Obama told the gathering he had authority to act from the WPR without their approval.³⁴ Operations in Libya commenced on March 19 and Obama reported it Congress consistent with the WPR without citing Section 4(a)(1). He derived authority from the UNSC resolution and his own inherent authority to conduct foreign policy and role as commander-in-chief. The mission was "limited and well-defined . . . to protect civilians and prevent a humanitarian disaster."³⁵

The executive's road to presidential war in Libya was replete with *Wilsonian* idealism. In his first public remarks on February 23, 2011, Obama sounded as if reading from the US Declaration of Independence. Libyans were entitled to the non-negotiable human rights of free speech, peaceful assembly, and self-determination. He claimed every country must honor these rights.³⁶ By the beginning of March, Obama adopted regime change stating Qaddafi had "lost the legitimacy to lead, and . . . must leave."³⁷

³³ Robert M. Gates, *Duty: Memoirs of a Secretary at War* (New York: Alfred A. Knopf, 2014) 511-514, 518, 521.

³⁴ *Ibid.*, 519.

³⁵ "Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya," *Public Papers of the Presidents of the United States: Barack Obama: 2011*, no. 1 (Washington DC: Government Printing Office, 2014), 280-281.

³⁶ "Remarks on the Situation in Libya," *Public Papers of the Presidents of the United States: Barack Obama: 2011*, no. 1, 150.

³⁷ "The President's News Conference With President Felipe de Jesus Calderon Hinojosa of Mexico," *Public Papers of the Presidents of the United States: Barack Obama: 2011*, no. 1, 173.

The president argued the U.S. and the international community must act to avoid the atrocities that plagued the Balkans and Rwanda in the 1990s.³⁸ Unlike the Balkans, he would not commit ground forces. In fact, UNSC Resolution 1973 explicitly forbade foreign occupation forces on Libyan territory.³⁹ In announcing the US-led action, Obama faulted Qaddafi for not recognizing the UNSC's authority to "preserve stability in the region" but failed to seek and gain authority from Congress for his limited war.⁴⁰

The Attorney General's Office of Legal Counsel (OLC) offered a weak legal opinion to justify the failure to seek Congressional approval. The OLC based its reasoning on previous instances where the executive ignored Congress and acted unilaterally. Given the short duration, limited scope, and low risk of casualties, the OLC suggested the executive did not need Congressional approval.⁴¹

Frustrated, the House passed a resolution with broad bipartisan support in early June 2011 as the sixty-day WPR window approached seeking clarity as to why the executive did not seek authorization. The White House responded with another legal memo stating the hostilities intended in the WPR did not match the operation in Libya. The legal memo stated Libya did not involve sustained fighting, ground troops, threat of casualties, or any chance of escalation. The memo's author had not researched Congress's original intent concerning *hostilities* in the WPR; the mere peril of those

³⁸ "The President's News Conference," *Public Papers of the Presidents of the United States: Barack Obama: 2011*, no. 1, 222.

³⁹ UN Security Council, "Security Council Resolutions: Resolutions adopted by the Security Council in 2011," United Nations, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973(2011)) (accessed March 1, 2015).

⁴⁰ "Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya," *Public Papers of the Presidents of the United States: Barack Obama: 2011*, no. 1, 280.

⁴¹ U.S. Department of Justice, Office of Legal Counsel, *Authority to Use Military Force in Libya*, by Caroline D. Krass, [Washington, DC, April 1, 2011], <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> (accessed March 1, 2015).

events implied hostilities. Undermining the administration's argument, the Defense Department was providing imminent danger pay to those participating in the operation.⁴²

Congress never passed a resolution authorizing military action or demanding its termination. Absent any unified response, ten House of Representatives members sought legal recourse through the District Court for the District of Columbia to declare the action in Libya a war and unconstitutional absent Congressional authorization. The court dismissed the case. In rendering its dismissal, the court provided several issues plaguing the plaintiffs' case. First, they pursued the case as individual members, not as the collective House of Representatives. Second, the court rejected the argument that continued military action nullified their legislative vote to reject the authorization of force; the vote occurred months after the executive commenced operations. Third, continued Congressional attempts to limit the operation showed that a legislative solution still potentially existed.⁴³ Obama's Libya campaign demonstrated the challenge facing a fragmented Congress attempting to balance ex post facto executive actions.

Since the passage of the WPR, the executive's small-scale use of military force in foreign policy has given Congress its greatest challenge in balancing the exercise of the commander-in-chief power. Congress's inability to pass binding legislation, despite large-scale support for non-binding resolutions, repeatedly undermined its authority and

⁴² Fisher, *Presidential War Powers*, 242-244.

⁴³ In sum, Congressional members have filed eight suits against presidents alleging abuse of the Constitutional war powers since the passage of the WPR. The cases involved action in El Salvador, Nicaragua, Grenada, Persian Gulf (reflagging Kuwaiti oil tankers), Iraq (1991 and 2003), the Balkans, and Libya. In each case, the court dismissed the suit with rationale ranging from "political question doctrine, equitable/remedial discretion doctrine, ripeness, mootness, and congressional standing." The lack of unified Congressional action willfully ignored by the president has prevented the appearance of a legal impasse worthy of judicial review. However, the view remains that "both statutory and constitutional war powers issues can be judicially determined if a legal, as distinguished from a political, impasse is created." Congressional Research Service, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, 1, 14-16.

trivialized its role to the executive branch. Congressional declarations of support for the military when the legislative branch opposed military action were political stunts and counterproductive to legitimate efforts to perform its check on the executive branch's use of war in foreign policy.

Large-Scale Use of Military Force

After the WPR, the first large scale use of American military force came about from Iraq's invasion of Kuwait on August 2, 1990. As it did in Panama, the Bush administration repeatedly expressed determination to act regardless of authorities granted. In the first three months following the invasion, Bush deployed 230,000 US troops to Saudi Arabia as part of a multi-national force to defend the country from potential Iraqi aggression. After the mid-term election, Bush told reporters on November 8 that he had directed another 200,000 deploy to give the force offensive capability, creating a firestorm in Congress. Bush was determined to evict Hussein from Kuwait even if meant impeachment.⁴⁴ In early December 1990, Secretary of Defense Dick Cheney testified before the Senate Armed Services Committee that the administration required no additional authority.⁴⁵ Asked by a reporter if he had authority to act without a UNSC resolution specifically authorizing force, Bush said he possessed all the authority needed to act to ensure Hussein complied with the previous ten UN resolutions.⁴⁶

⁴⁴ Colin Powell, *My American Journey* (New York: Random House, 1995), 489, 499.

⁴⁵ Fisher, *Presidential War Powers*, 170.

⁴⁶ "The President's News Conference on the Persian Gulf Crisis," *Public Papers of the Presidents of the United States: George Bush: 1990*, no. 2 (Washington DC: Government Printing Office, 1991), 1580, 1582. The UNSC passed Resolution 678 on November 29, 1990 sanctioning use of "all necessary means" by member states if Iraq failed to comply with previous resolutions by January 15, 1991. U.N. Security Council, "Security Council Resolutions: Resolutions adopted by the Security Council in 1990," United Nations, <http://www.un.org/en/sc/documents/resolutions/1990.shtml> (accessed March 1, 2015).

Speaking to reporters again on January 8, 1991, Bush said he would “welcome a [Congressional] resolution that says we [the collective US government] are going to implement the United Nations resolutions to a tee;” if Congress failed to pass one, multiple lawyers had told him he had the authority to act without it.⁴⁷ On January 12, Congress gave Bush legislative authority in accordance with the WPR to use military force pursuant to UNSC Resolution 678.⁴⁸ Bush praised the vote as showing the nation had closed ranks but reiterated his request for Congressional support did not imply a change in his opinion on the executive’s unilateral authority to use force to defend national interests.⁴⁹

The second large-scale deployment of military force overseas followed the terrorist attacks against the US homeland on September 11, 2001. Some members of Congress recognized their obligation to clarify the use of force in accordance with the Constitution and the WPR. Representative Peter DeFazio cautioned against rushing a bill through Congress that would be tantamount to another open-ended Gulf of Tonkin Resolution. Yet, he spoke from the House floor recognizing President George W. Bush’s inherent authority to place forces into hostilities due to the “national emergency created by attack upon the United States” as detailed under Section 2(c) of the WPR.⁵⁰ The *Jacksonian* passion of the day soon captured other members. Representative Randy

⁴⁷ “The President’s News Conference on the Persian Gulf Crisis,” *Public Papers of the Presidents of the United States: George Bush: 1991*, no. 1 (Washington DC: Government Printing Office, 1992), 19-20.

⁴⁸ *Authorization for Use of Military Force Against Iraq Resolution*, Public Law 102-1, *U.S. Statutes at Large* 105 (1991): 3-4.

⁴⁹ “The President’s News Conference,” *Public Papers of the Presidents of the United States: George Bush: 1991*, no. 1, 31; “Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq,” *Public Papers of the Presidents of the United States: George Bush: 1991*, no. 1, 40.

⁵⁰ *War Powers Resolution*, § 2, 555.

Cunningham sought unanimous support for the authorization of force to declare “war against all terrorists now threatening our Nation, and those who support them.”⁵¹

Three days after the attacks, Congress gave Bush authority to use military force pursuant to the WPR in prosecuting the Global War on Terror (GWOT). Congress implicitly approved the rapidly emerging doctrine of pre-emptive war, stating the president had Constitutional authority to prevent and deter terrorist attacks against the homeland. Furthermore, the law gave the president broad authority against “nations, organizations, or persons he determine[d] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”⁵² In signing the bill, Bush pledged continued consultation with Congress while reiterating the executive stance of inherent constitutional authority to use military force.⁵³

On September 19, 2002, Bush sent another draft use of force resolution to Congress regarding Iraq. Asked about the importance of having authority to use force, Bush replied initially that to keep the peace, he needed authority to use force. He quickly surmised the request was more of a chance for Congress to show its support.⁵⁴ In the proposal, Bush sought authority to use all appropriate means, including force, to enforce

⁵¹ *Cong. Rec.*, 107th Cong., 1st sess., 2001, 147, no. 121: E1666; Representative Jose Serrano felt compelled to disregard his normal reluctance to endorse military actions in support of national objectives hoping the president recognized the awesome power Congress granted and would use it prudently. *Cong. Rec.*, 107th Cong., 1st sess., 2001, 147, no. 123 E1679.

⁵² *Authorization for Use of Military Force*, Public Law 107-40, *U.S. Statutes at Large* 115 (2001): 224.

⁵³ “Statement on Signing the Authorization for Use of Military Force,” *Public Papers of the Presidents of the United States: George W. Bush: 2001*, no. 2 (Washington DC: Government Printing Office, 2004), 1124-1125.

⁵⁴ “Remarks Following a Meeting With Secretary of State Colin L. Powell and an Exchange With Reporters,” *Public Papers of the Presidents of the United States: Administration of George W. Bush: 2002*, no. 2 (Washington DC: Government Printing Office, 2005), 1618.

UN resolutions, defend national security interests, and restore peace and security in the region.⁵⁵ Congress reigned in the request's broad nature and granted him authority in accordance with the WPR to use force to defend against the Iraqi threat to national security and enforce all relevant UN resolutions.⁵⁶ Despite publicly acknowledging Congress's grant of authority, Bush restated the consistent executive opinion of unilateral power to use force against threats to US interests in his letter returning the signed law.⁵⁷

Recent Concerns

Congress's failure to specify the various aspects implied with the WPR's use of *consultation* created another loophole for presidents to expand executive authority. The commander-in-chief has the authority to oversee the conduct of a war. Enabled by the GWOT authorization's language, President Bush made broad executive decisions in prosecuting the war that ran counter to several American traditions. The term *persons* gave justification for overturning longstanding executive orders banning assassination. The authorization made any al-Qaeda operative anywhere in the world a target whether or not he planned or participated in the 2001 attack.⁵⁸ Critics also claimed Bush used the authorization to conduct warrantless eavesdropping on American citizens and to establish secret prisons around the world, including the detention facility at Guantanamo Bay, in order to kidnap, interrogate, and hold any person suspected of terrorism.⁵⁹

⁵⁵ *Cong. Rec.*, 107th Cong., 2d sess., 2002, 148, no. 119: S8898.

⁵⁶ *Authorization for Use of Military Force Against Iraq Resolution of 2002*, Public Law 107-243, *U.S. Statutes at Large* 116 (2002): 1501.

⁵⁷ "Statement on Signing the Authorization for Use of Military Force Against Iraq Resolution of 2002," *Public Papers of the Presidents of the United States: Administration of George W. Bush: 2002*, no. 2, 1814-1815.

⁵⁸ Jeremy Scahill, *Dirty Wars: The War is a Battlefield* (New York: Nation Books, 2013), 19, 24.

⁵⁹ Editorial, "Repeal the Military Force Law," *New York Times*, March 9, 2013, http://www.nytimes.com/2013/03/10/opinion/sunday/repeal-the-authorization-for-use-of-military-force-law.html?_r=0 (accessed March 1, 2015).

President Obama, bolstered by technologically advanced armed Predator drones, used the GWOT authorization as justification for a targeted killing program operating outside of Congressional oversight.⁶⁰ Most concerning to civil libertarians, the program included the death of three American citizens. The first was Anwar Al-Aulaqi, a dual-citizen born to Yemeni parents. After learning his son was on a government kill list in 2010, Anwar's father, Nasser, pursued legal action against the Obama administration in order to learn the criteria under which citizens would find themselves targeted. The judge wondered how the government could be required to get judicial approval to conduct electronic surveillance of citizens overseas but did not require the same scrutiny when targeting citizens for death. The judge dismissed the case saying that Nasser did not have legal standing to file the case on behalf of his son and it involved "political questions" that belonged with the elected branches to resolve. A drone strike killed Anwar and another American, Samir Khan, on September 30, 2011.⁶¹ A strike two weeks later killed a third US citizen, Anwar's 16-year-old son Abdulrahman.⁶²

These recent expansions of executive power coupled with Congress's challenge in checking the president's short-term use of force indicate future challenges. Advanced technology weapon systems employed through the WPR's legal loopholes can enable the president to conduct highly tailored military operations without prior Congressional approval or oversight. These new technologies could allow the executive to expand the existing disparity between the Constitution's intent on the separation of war powers and the recent dominance of the executive branch in deciding when to use military force.

⁶⁰ Ibid.

⁶¹ Fisher, *Presidential War Powers*, 261; Scahill, *Dirty Wars*, 391-392.

⁶² Scahill, *Dirty Wars*, 507-508.

Chapter 6 - Recommendations

The framers of the Constitution intended for Congress to have the preponderance of the federal government's war powers. Congress has the right to require the executive seek its authorization before using military force in cases that do not involve direct attacks on US territory. The recent dominance of *Jacksonian* and *Wilsonian* foreign policy views inside the executive branch does not change Congress's legal foundation. However, each popular unilateral action by the executive makes Congress's task more difficult in the public opinion arena. If Congress wants to reassert its proper role, it must act deliberately to balance the executive's use of war in American foreign policy. By embracing a more consistent *Jeffersonian* approach, Congress can ensure compliance with the framer's intent found in the language of the Constitution. It can do so through multiple methods.

Structural changes to the War Powers Resolution

Four decades of observation show the WPR needs strengthening to give Congress greater ability to deter unauthorized executive action in the first place. First, Congress should cut the sixty-day option dramatically. Given America's global strike capability, fifteen days is ample time for an executive to take punitive retaliatory action in response to small attacks on American citizens. Rapid action following the 2001 terrorist attacks demonstrates Congress's ability to pass legislative authorization, or formal declaration, in an expeditious manner if an attack truly merits a large-scale response.

Second, change Section 8(d) of the WPR that states the intent of the bill is not to change the authority granted in the Constitution; it is counterproductive. A revised WPR, or separate resolution, should add greater specificity to the executive's commander-in-

chief enumerated power. The necessary and proper clause gives Congress this authority. The specified power to act unilaterally as commander-in-chief should focus solely on American lives, not interests or property. In the nuclear era, the president should have the specified authority to execute a response or retaliatory strike to a catastrophic nuclear attack. In addition, the president should have authority for hostage rescue operations of US civilians, nationals or military members in a non-combat status, or on leave, overseas. A formal declaration of war or authorization to use military force would cover operations to rescue military members held as prisoners of war.

Third, increase the executive's specified authority to handle limited international crises. It should not require Congressional approval for an ambassador requested non-combatant evacuation operation to remove embassy personnel and US nationals from an imploding country. While these operations could involve hostile actions by US forces, the fifteen-day limitation provides time to evacuate citizens while pursuing formal authority, as needed, to respond to a greater national threat. The executive should have the specified authority to use military forces to respond to humanitarian assistance and disaster relief operations for sudden natural disasters (e.g. hurricanes, floods, tsunamis, earthquakes). This would not apply to man-made disasters such as genocide or long-term challenges associated with famine. Countering man-made disasters requires the support of the American population. Congress should ensure the executive develops an appropriate strategy, adapted as environmental conditions change, which does more than treat symptoms before authorizing or providing continued funding.

Fourth, Congress should formally clarify the intent of the terms *hostilities* and *consultation* to prevent continued loophole exploitation. In addition, it should establish a

smaller consultation group to work with the executive when crises that require authority to use military force arise. The consultation group could be as small as the President Pro Tempore, Speaker of the House, and the majority and minority leaders from each house. The optimum construct would include the chair and ranking minority members from Congress's armed service, intelligence, and foreign affairs oversight committees. This committee would ensure Congress acted in a deliberate but expeditious manner to vote on binding resolutions. It would also maintain regular consultations with the executive during the prosecution of the war to ensure proper oversight mechanisms are in place to prevent potential abuse of authority that ran counter to American ideals and civil rights.

Fifth, specifically state the executive alone does not determine the national interests. Congress is the representative body of the masses. While the president leads the nation's interaction with foreign countries, it is Congress's role to speak to and protect the interests of the populace. Whether the executive intends the use of military force to constitute a formal or limited war, the president should make his case to the public and have Congress execute its responsibility by formal vote.

Legislative Actions

In addition to strengthening the WPR, Congress must act legislatively to balance executive overreach of powers. The Constitution intends for three equal branches to share the federal government's power. When the executive overreaches, the legislature must respond to protect that balance. The nuclear option is impeachment. It is an extreme measure that potentially carries significant political costs. History shows Congress typically acts to provide authorization for large-scale uses of military force. This could be

an effective tool for a controversial involvement in a limited war since only the House of Representatives would need to vote to start the proceedings in the Senate.

A more effective approach to the common overreach with regard to small-scale conflicts is to employ a graduated response. Start with a formal censure. Ideally, both houses would pass the censure to show the unity of the legislative branch. However, individual house censures publicly debated may influence actions of the executive. Congress should get away from the “Sense of” approach to expressing its opinion.

Following censure, Congress should act to restrict legally the use of funds for unauthorized military operations. Opponents of the War Power Resolution cite the authority of Congress to control the funds regarding overseas deployments as a natural restraint on executive action. That approach appeared effective and the Somalia case study shows executive compliance. The problem with control through funding alone is it occurs after troops are already in hostilities. It cedes the dominant political narrative to the executive – those in favor of restricting funds fail to support the troops. Passing funding restrictions concurrent with a formal censure counters the executive’s narrative and clearly expresses Congress’s intent to rebalance any overreach.

The third option is to force the judicial branch to offer an updated opinion on Congress’s role in limiting executive war power. The only enumerated executive power is commander-in-chief, a role that Hamilton purposefully described in a limited manner. Courts dismissed recent attempts by Congressional members to sue the president because the body failed to act in a unified manner through a passed resolution. The legal option is difficult and time sensitive given the challenge of mootness. If Congress passed a joint resolution denying the use of force or mandating force withdrawal that the president

vetoed, it would greatly increase Congress's legal justification. Constitutionally, a simple majority in one house can vote to deny a formal declaration of war or authorization to use force. In this scenario, the executive would have overstepped the Constitutional construct by forcing two-thirds of both houses to override the veto of the resolution denying the declaration of war or authorization to use force. The second option is force an opinion on the concurrent resolution section of the WPR and make the courts decide whether Congress delegated its legislative authority to the executive branch in the WPR. In either case, both houses of Congress must create a true legal impasse for the court to render an opinion by passing the same resolution. This would provide an alternative in scenarios where impeachment would not be feasible. Further, it would leave the sitting president in power, avoiding passage of power to a potentially less-qualified vice-president.

The world has grown much smaller since the passage of the WPR; the September 11, 2001 terrorist attacks reminded the country that the homeland was in direct danger of surprise attacks at any time. Since 1973, presidents have largely treated the WPR as a ceremonial obligation that in no way limited the commander-in-chief authority. In two instances – Somalia and Bosnia – Congress attempted to limit the executive's authority to employ military force. Yet procedurally, Congress as a body has been unable to assert its prerogative consistently in this area. Currently, the nation is engaged in a debate about the true threat to the nation and appropriate response to the Islamic State of Iraq and Syria, or ISIS. Recent history indicates that unless Congress embraces a *Jeffersonian* approach, future executives, bolstered by technological advances, will continue to expand their authority claimed via the commander-in-chief role to commit the nation to war.

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Vita

Lieutenant Colonel William Halsey Burks earned his commission from the United States Air Force Academy in 1995. Following graduation, he served as an aircraft maintenance officer for three years before attending undergraduate pilot training in 1998. Lt Col Burks flew the C-141B and C-17A aircraft rising to Evaluator Aircraft Commander in the C-17. Currently, he is a command pilot with more than 3,200 flight hours including combat time in support of Operation Enduring Freedom, Operation Iraqi Freedom, and Operation New Dawn. Lt Col Burks commanded the 405th Expeditionary Operations Support Squadron in Thumrait, Oman. He holds Masters Degrees from the US Army Command & General Staff College and the US Army School of Advanced Military Studies. He is married and has one son.